In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-843

ROBERT L. GORDON, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that he was placed twice in jeopardy for the same offense when retried after a previous jury was unable to reach a verdict.

After a jury trial in the United States District Court for the Southern District of California, petitioner was convicted of conspiracy to deal in marijuana, in violation of 21 U.S.C. 846 and 963. He was sentenced to four years' imprisonment and two years of special parole. The court of appeals affirmed in a thorough opinion, on which we rely (Pet. App. A).

Prior to petitioner's conviction in the Southern District of California, he was indicted for the same crime by a federal grand jury in the District of Nevada. Trial on that charge began on April 2, 1973, and the matter was submitted to the jury on April 5, 1973. After more than ten hours of deliberation, extending until the late afternoon of

April 6, and after having returned to the courtroom once for further instructions, the jury indicated to the judge in writing that it was unable to reach a verdict. After the jury was returned, the following colloquy occurred (R. 25):

> THE COURT: Ladies and Gentlemen, I have your note [that] you are unable to reach a unanimous agreement, signed by your foreman. You feel, do you, that it is hopeless to pursue your deliberations any further?
>
> THE JURY FOREMAN: Yes, we have tried.
>
> THE COURT: You have tried?
>
> SEVERAL JURORS: Yes.
>
> THE COURT: And you don't think that any further deliberation will be apt to produce a unanimous verdict? Is that true? Or do you think it would help?
>
> JUROR NO. 2: Not enough, Your Honor.
>
> THE COURT: Well, you have been at this since noon yesterday. And is this the concensus of the group? That is, do most of you feel this way?
>
> JUROR NO. 4: True.

Before the court declared a mistrial, counsel for a co-defendant objected in chambers to a mistrial and suggested that an "Allen charge" be given (R. 27). (The record does not support petitioner Gordon's claim (Pet. 4) that he also objected to the mistrial and requested the Allen charge (Pet. App. 2a, 7a-8a).) The judge believed that it would be wrong to "push" the jury to a verdict and, therefore, declared a mistrial (R. 28).

Petitioner agrees (Pet. 6) with the settled proposition that "a genuine inability to agree on a verdict constitutes a 'manifest necessity' to declare a mistrial and subjects a defendant to a retrial" without violating the Double Jeopardy Clause. *E.g., United States* v. *Perez*, 9 Wheat. 579;

see *Illinois* v. *Somerville*, 410 U.S. 458, 464. He argues, however, that the trial judge abused his discretion in finding a genuine inability to agree by the jury in this case.

This claim is without substance. As the court of appeals correctly stated (Pet. App. 13a-14a):

> Based on these considerations, it is clear that the trial judge below did not abuse his discretion in declaring a mistrial after the jury indicated it was hopelessly deadlocked after over ten hours of deliberations over two days. The trial took three and a half days, and the time spent in deliberation by the jury was not so disproportionately brief as to indicate that further discussion was necessary. The time taken by the jury falls within the average time spent by juries in cases of similar length. * * *
>
> This jury indicated to the judge in writing that it was deadlocked. He did not rely on this statement alone, but rather called them into open court and questioned the foreman and members as to whether there was any possibility that a verdict could be reached and whether additional time for deliberation would be of assistance. The replies were all negative. The experienced trial judge, having observed the jury during the three and a half days of trial and having seen and heard their responses to his questions in open court, concluded that any additional actions on his part to "push" the jury towards a decision would be inappropriate. Accordingly, he dismissed the jury and declared a mistrial, denying requests of counsel for continued deliberations and an Allen charge.
>
> No request was made by counsel for the appellants for the court to poll the jurors individually with respect to the prospect of reaching a verdict. The judge's questions in open court certainly provided both an

opportunity for jurors to give contrary opinions and for the judge to gauge their individual reactions to his questions. In such circumstances it would be inappropriate to rule that the trial judge had abused his discretion by failing to poll the jurors individually.

We also note that it was not error for the judge to refuse to give the Allen charge. See *Allen* v. *United States*, 164 U.S. 492, 501-502. When the judge feels that the Allen instruction would have a coercive effect, he may refuse to give it. See *United States* v. *Medansky*, 486 F.2d 807, 813 (C.A. 7), certiorari denied, 415 U.S. 989. Here the trial judge rejected the Allen charge because he did not want to "push" the jury to a verdict (R. 28).[1]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MARCH 1975.

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[1]Petitioner's reliance (Pet. 8) on *United States* v. *Lansdown*, 460 F.2d 164, 167 (C.A. 4), is misplaced. The jury in that case, on returning to the courtroom under the judge's direction, reported that it was "on the verge" of a verdict and one juror requested an additional ten minutes of deliberation. Despite this evidence of a possible verdict, the trial judge declared a mistrial. The court of appeals found no "manifest necessity" for a mistrial there, where there was no indication, as here, that the jury was hopelessly deadlocked.